Testimony of

Gene Kimmelman
Senior Director of Public Policy and Advocacy
Consumers Union

on behalf of

Consumers Union
Consumer Federation of America

before the

United States House of Representatives
Energy and Commerce Committee
Subcommittee on Telecommunications and the Internet

regarding the

Staff Discussion Draft of the Broadband Bill

November 9, 2005

Consumers Union
Headquarters Office
101 Truman Avenue
Yonkers, New York 10703-1057
(914) 378-2029
(914) 378-2992 (fax)

Washington Office
1666 Connecticut Avenue, NW
Washington, DC 20009-1039
(202) 462-6262 Suite 310
(202) 265-9548 (fax)

West Coast Regional Office
1535 Mission Street
San Francisco, CA 94103-2512
(415) 461-6747
(415) 431-0906 (fax)

South West Regional Office
1300 Guadalupe, Suite 100
Austin, TX 78701-1643
(512) 477-4431
(512) 477-8934 (fax)

Testimony of
Gene Kimmelman
Senior Director of Public Policy and Advocacy, Consumers Union
on behalf of
Consumers Union
Consumer Federation of America

U.S. House Subcommittee on Telecommunications and the Internet
regarding the
Staff Discussion Draft of the Broadband Bill
November 9, 2005

Consumers Union[1] and Consumer Federation of America[2] appreciate the opportunity to testify on the broadband policy discussion draft. We are grateful to Chairman Barton and members of this Subcommittee for their leadership on these important consumer issues.

For decades, consumers have suffered under monopolistic cable pricing that has resulted in skyrocketing cable bills and fewer consumer choices. And despite the promise of more competition in wireless and wire line phone services, consumers have seen more consolidation and fewer marketplace choices. But the advent of broadband now offers tremendous opportunity to inject new and potentially vigorous competition into the telecommunications marketplace that has become increasingly concentrated over the past decade.

We welcome the Committee's interest in fostering greater consumer choice by allowing communities to offer affordable broadband services to their residents. The draft provision prohibiting preemption of municipal broadband services helps ensure that communities do not face additional roadblocks to affordable broadband access for their residents.

If communities build open broadband systems, consumers will no longer be held hostage to the dominant phone or cable provider—they should be able to get video, voice and Internet services from many sources. Broadband, whether offered by the municipality or other provider, can break the anticompetitive spiral by loosening the stranglehold that dominant telephone and cable monopolies have enjoyed for decades. But in order for that opportunity to be realized, broadband policies must facilitate the entrance of *new or alternative* market players that offer voice, video and data services widely available from cable, telephone companies or any other delivery system.

---

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to Provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Report*s, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

However, given the enormous consolidation in wire line and wireless communications services, this draft fails to deliver the policies necessary to ensure that consumers will receive meaningful growth in price competition in what has become the most important telecommunications service—broadband connectivity. The draft's failure to confront the last mile bottlenecks created by the dominant providers' existing control over competition may in fact foreclose opportunities for future meaningful competition in broadband.

Worse, the draft takes a step in the opposite direction, relieving incumbent monopolists of key obligations while giving them unprecedented ability to restrain broadband competition, and therefore phone and video competition, offered by new market entrants. Technological change must not result in the abandonment of fundamental values embraced over 70 years of telecommunications policy – values like nondiscrimination, participation in decision making, and protection of both new market players and consumers from abuse.

This draft hands over unprecedented power to broadband providers to discriminate among potential competitors and prevent their own customers from freely accessing content on the Internet and to use applications and devices of their choice. As it purports to promote competition in voice, video and data services, it virtually ensures that the two dominant incumbents will compete at most with each other while squeezing out third party competitors. It preempts the ability of localities to require new video entrants to build out their services to all consumers without imposing any national requirements for true competition. It federalizes all decisions on consumer protection while unfairly limiting the types of standards the Federal Communications Commission is authorized to establish. It precludes enforcement of even those limited standards by the states and gives consumers the unsatisfactory remedy of a drawn-out federal complaint resolution process. Consumers will be left with no where to turn and no remedy for relief.

In short, the American consumer is being asked to give up a great deal in exchange for another promise of competition at some distant point in the future. Consumers have had their pockets picked too many times to be fooled again. Twenty years of broken promises make us skeptical that the sacrifices being asked of the public by this discussion draft will ever be offset by competitively driven reductions in prices or improvements in service quality. History tells a different story: one of increasing concentration, skyrocketing cable bills, and bigger bundles of expensive services forced on consumers by both the cable and telephone industries.

Our specific comments on the draft follow:

Nondiscrimination & Network Neutrality

The promise of broadband is its ability not only to provide consumers with unlimited access to diverse sources of information and online services, but also to offer competitive alternatives to dominant telephone and video services providers through voice and video over Internet. But that competition will be stifled if broadband Internet transmission service providers are allowed to effectively block consumer access to both content and competitive services that

use the provider's service. Unfortunately, the discussion draft, in its current form, does not prevent that.

Section 104 codifies the principle that broadband providers should operate their networks in a neutral manner but simultaneously provides extensive exceptions, inviting network operators to discriminate against content, applications or devices that they do not own or control. The draft opens a wide door to discrimination.

The draft bill allows broadband Internet transmission service (BITS) providers to discriminate against content, devices and applications they do not own so long as they can justify such discrimination under the guise of network management. This loophole is expanded for broadband video services that integrate Internet capabilities or those who provide enhanced service quality by declaring that they "may not unreasonably" impair, interfere, restrict or limit applications or services, but offers no standard for what is "unreasonable" and contemplates no rulemaking to do so. There is a significant danger that "reasonable" discrimination may be nothing more than a desire to maximize revenue by blocking competition. Processes to resolve discrimination complaints allow BITS providers to block content or restrict use of devices and applications as complaints are resolved. This foot-dragging strategy is the model that the industry used to strangle head-to-head competition in the past decade.

Giving network operators the power to dictate services opens the door to the "cablization" of the Internet. Cable and telephone company giants are encouraged by this bill to bundle more services together in take-it-or-leave-it packages and to make it harder, not easier, for competing communications service providers and Internet applications developers or service providers to reach the public. Both cable and local telephone industries have a long history of using their market power to stifle competition and undermine consumer choice. In the past decade, the cable industry has inflated monthly cable bills by more than 60 percent[3] and forced consumers to pay twice for Internet service if they want an Internet service provider other than the cable owned entity. The result has been thousands of Internet service providers out of business.

Telephone companies have followed a similar path with respect to local competition. Dragging their feet on market opening, they made it virtually impossible for competing local exchange carriers to get into the market. Once the Bells were let back into long distance, they slammed the door on competition and bought up much of what remained of the competitive local exchange carrier industry. At the same time, they have tied their high-speed Internet service (DSL) to voice, much like the cable operators tied Internet service to their high-speed communications. This duopoly dribbles out bandwidth increasingly in bundles that are unaffordable for most Americans. As a result, over the past half decade, America has fallen from third to sixteenth in penetration of high speed Internet access[4] and what we call high speed is vastly slower than what the rest of the world does.

---

[3] Bureau of Labor Statistics, Consumer Price Index (November 2005). From 1996 until September 2005, CPI increased 28.7% while cable prices rose 63.8%, 2.3 times faster than inflation.

[4] Organization for Economic Co-operation and Development (OECD), OECD Broadband Statistics, December 2004. Available at http://www.oecd.org/document/60/0,2340,en_2649_34225_2496764_1_1_1_1,00.html ; International Telecommunications Union, Broadband Statistics, April 13, 2005. Available at

Giving the duopoly more power to control the consumer and undermine competition will not solve the problem, it will make it worse and it will have the added cost of further undermining innovation in broadband services. Learning a lesson from the cable operators, who have been free to close their network for years, the CEO of SBC, the nation's largest telephone company, has already declared his intention to use the new-found freedom to discriminate against and charge fees of Internet applications and service providers.[5] By imposing limits on download speeds and declaring certain applications unacceptable, the cable operators sent a strong signal that they would control the services that flowed through the cable wires. Innovators abandoned the space and innovation moved abroad. With the telephone companies now poised to pursue the same anticompetitive, anti-innovation strategy, a long shadow has been cast over the Internet applications market in America.

The importance of ensuring nondiscrimination in Internet access and traffic cannot be underestimated. It's important to understand that the Internet only grew and thrived because of two mandates of openness. First, the Internet protocols were developed as open protocols under government direction. The agencies that operated the Internet required the interconnecting networks to adopt and abide by these open protocols. Second, the underlying transmission medium, the telephone network, was required by law and rule to be operated in a nondiscriminatory manner under sections 201 and 202 of the 1934 Communications Act[6], which make it unlawful for a provider to impose unjust and unreasonable rates, terms and conditions on other providers. This draft bill effectively repeals those provisions by making them inapplicable to BITS and BITS providers and yet provides the Commission with no authority to promulgate rules or standards for non-discrimination on networks. Moreover, the minimal interconnection obligations for BITS and BITS providers included in the bill are not even subject to a standard that requires interconnection based on a public interest standard. Instead, interconnection agreements are left solely to the discretion of the dominant network provider and the unaffiliated provider seeking interconnection, with no standards for what they must include and what is prohibited.

Strong, enforceable nondiscrimination provisions are essential to continued growth and competition in not just broadband service, but also for continued innovation in Internet content, services, and applications. The draft bill not only fails to provide standards for what impairment, interference or blocking is considered "unreasonable," it provides no meaningful remedy for those unaffiliated providers whose applications, services or content is restricted by a BITS provider. And it places the burden of proving that interference is "unreasonable" squarely upon those whose rights are violated—businesses with far less power than the dominant incumbent and consumers, who are entirely powerless under the bill's complaint procedure.

Though the draft gives the Federal Communications Commission the authority to order continuation of service while a discrimination complaint is being resolved, the authority is

---

http://www.itu.int/osg/spu/newslog/ITUs+New+Broadband+Statistics+For+1+January+2005.aspx

[5] "At SBC, It's All About 'Scale and Scope,'" *Business Week,* November 7, 2005, http://www.businessweek.com/magazine/content/05_45/b3958092.htm

[6] 47 U.S.C. §§ 201-202.

discretionary. More likely, the dominant incumbent will block the applications, content or device provider during the months-long complaint investigation and resolution process, undermining the viability of the competitive business. Because of the history of network discrimination, the draft should place the burden of proving that blocking, impairment or interference content, services or applications *is* reasonable by requiring the BITS provider to bring a complaint to the Commission and mandate service continuation until permission to impair is provided. Until that case is effectively made, the services, content and applications should not be interfered with.

Additionally, considering that broadband networks will become the major means of communications in this country, the Committee should retain a strong public interest standard for interconnection agreements and authority for the Commission to mandate interconnection when it is in the public interest.

National Franchising

While we applaud the goal of expanding competition to cable monopolies, if Congress establishes a national franchise for competitive video services in order to foster more competition, it must also provide for strong, uniform, minimum ***national*** standards that meet the needs of communities. In particular, this must include provisions to meet community programming needs, ensure build-out and prevent redlining—all negotiating authorities previously provided to localities but effectively eliminated by the draft. If communities are forced to forfeit their rights to ensure fair treatment of and service to their residents, this bill must also establish adequate national standards in place of those local rights. Without these requirements, the promise of more competition will be just another empty one.

In the absence of explicit requirements that the Bell-entrants build out and make their services available to all consumers in a local franchise area, we fear competitive video services will come only to "high-value" consumers—those capable of paying for the full bundle of services that the Bells wish to offer. The favoring of upscale consumers to the exclusion of low-income, minority and ethnic groups in the provision of consumer services has long been a concern in the communications industry and is of growing concern in advanced telecommunications services given the importance of broadband access to functioning in today's society. The anti-redlining provision (Section 304(c)) is a symbolic step in the right direction to ensure that low-income communities—those most in need of price relief that broadband competition can bring—are not excluded by broadband video service providers.

Unfortunately, by providing sole enforcement power to the Commission and preempting local and state authorities in this area, we have strong concerns that the prohibition will be largely meaningless. The Commission will be charged with monitoring compliance in potentially thousands of communities, with no new resources dedicated to that enforcement and no adequate date on which to base its determinations. Moreover, the enforcement provision lacks specificity both as to how the Commission will monitor compliance by broadband video service providers and how quickly it will take action to remedy nonperformance by providers. We urge your consideration of shared or sequential monitoring and enforcement of anti-redlining provisions by the Commission, the states and localities. And it is unclear whether discrimination based on race,

ethnicity or other exclusions based on a "lack of projected demand for service" would be allowed under the draft legislation.

However, even enforceable anti-redlining provisions may be incapable of ensuring service to low-income populations so long as the burden lies with authorities to prove that income is the sole reason that service has been withheld as provided for in the draft. The combination of the lack of build-out requirements for new video service providers, together with relatively weak anti-redlining enforcement and the absence of meaningful local franchise negotiating authority, will prevent communities from taking action to ensure that all of their residents enjoy the benefits of competition.

If legislation is to forfeit local franchising authority rights, it should also establish national mandatory minimum build-out requirements for new market entrants in the local franchise area in which they intend to provide service. If timely build-out is not required, then the Committee should require new entrants to provide financial resources to local communities or states for use in fostering alternative means of ensuring broadband competition and service to the entire community rather than to high-value customers alone. Those resources could be used to establish community broadband networks, competitive commercial services to areas underserved by the new entrant, or other means of assistance to help low-income consumers access advanced telecommunications services at affordable prices. Though Section 409 respects the rights of communities to build their own networks, it eliminates only one barrier—preemption. It provides no resources to assure municipalities can establish these networks. This is particularly a problem for communities with large low-income populations.

Application of Video Regulations to Broadband Video Service Providers

Although the draft appears to apply current pro-competitive video rules (e.g. access to programming, ownership limits, must-carry) to new broadband video service providers, it opens the door to eliminating important statutory and regulatory protections within four years without a demonstration that such rules no longer serve the public interest. By allowing the few requirements Congress imposed on cable monopolies to promote competition—which enabled the satellite industry to grow and broadcasters to deliver quality local television programming—to expire without a thorough demonstration that all public benefits derived from these rules can clearly be attained through market forces, the draft would undermine some of the most important avenues for achieving diverse and competitive sources of television news and information. There is simply no reason to let the Commission eliminate these important pillars of public safety without Congress first initiating such modifications through targeted legislation.

Consumer Protection

The bill's preemption of state regulation over BITS, VOIP, and broadband video services is a significant concern. States are frequently the first line of defense for consumers in resolving complaints about fraud, inadequate service, pricing and other anti-consumer behavior. Instead the bill requires the Commission to establish national consumer protection standards for these services. As unsettling as federal preemption of all state regulation or enforcement is, equally

troubling is the omission in this most recent draft of several directives for Commission standards included in earlier iterations of this legislation. Omitted provisions include limitations on early termination fees, requirements for customer service standards and the maintenance of consumer complaint records. If the Commission is allowed to preempt state regulation and enforcement, it must be required to issue comprehensive standards that fully protect consumers rather than be limited to the minimal mandates in the bill.

In addition, because the draft allows telecommunications companies to redefine themselves as BITS, BITS providers, or broadband video service providers, they are able to skirt existing state and local consumer protection standards for traditional services.

By preempting states from developing their own consumer protection standards and then simultaneously preventing their final enforcement of national standards, the bill significantly weakens consumer protections. States will have only the ability to issue compliance orders when providers violate Commission standards. They can take no enforcement action of their own, raising serious concerns about the timeliness and resolution of consumer protection violations given Commission resources. And if a consumer complaint does not clearly fall under a national standard, consumers will be forced to wait for subsequent Commission action in order to resolve their problems.

Finally, the complaint process envisioned by the draft threatens to leave consumers, municipalities and states without resolution of concerns for many months as the Commission forwards the complaint to the offending party, awaits an answer, investigates the complaint and then mediates or arbitrates the issue. At a minimum, any legislation should provide states with the ability to enforce federal standards and allow states the flexibility to protect consumers against new forms of abuse while awaiting Commission action to formulate final rules.

Rights of Municipalities to Provide Broadband Networks

We offer our strong and unqualified support for Section 409, which prohibits state preemption of municipal broadband networks—a critical component of any legislative package that seeks to increase consumer access to advanced telecommunications services. The provision is essential to any legislation that seeks to foster competition in data, video and voice services, and expand affordable high-speed Internet access to all Americans.

Hundreds of communities have responded to the lack of affordable broadband access by creating their own networks through public-private partnerships, offering new opportunities for entrepreneurs. Community broadband networks offer an important option for communities in which broadband services reach only certain areas or are offered at prices out of reach for many consumers. Equally important, the mere possibility that a community may develop a broadband network helps discipline the marketplace.

Efforts to prohibit these community networks stifle competition across a range of telecommunications services, stall local economic development efforts, and foreclose new

educational opportunities. Section 409 of the draft ensures that communities that want to foster broadband access are not precluded from doing so.

Summary

We applaud the Committee's efforts to modernize regulation to foster broadband competition, technological innovation and adoption of high-speed Internet. Unfortunately, the approach of this draft heads in exactly the opposite direction: it will hamper competition, stifle innovation, and do little to promote ubiquitous affordable access to advanced services. We look forward to working with you to address these issues as the Committee continues its work.